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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re A.T., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

M.T.,

Defendant and Appellant.

D075752

(Super. Ct. No. J519882)

APPEAL from a judgment of the Superior Court of San Diego County, Marian F.
Gaston, Judge. Affirmed.

Paul A. Swiller, under appointment by the Court of Appeal, for Defendant and
Appellant.

Thomas E. Montgomery, County Counsel, Caitlin E. Rae, Chief Deputy County
Counsel, and Jesica N. Fellman, Deputy County Counsel, for Plaintiff and Respondent.

M.T. (Mother) appeals the juvenile court's findings and orders regarding her daughter A.T. (Child) following a combined jurisdictional and dispositional hearing. Mother contends the court erred in denying her request for new appointed counsel without conducting a *Marsden*¹ hearing or inquiring into the reasons why she was requesting new counsel. We agree the court should have inquired into the basis for Mother's request but conclude the error was harmless.

FACTUAL AND PROCEDURAL BACKGROUND

Mother is a recurring methamphetamine addict, which has contributed to her homelessness, unemployment, and engaging in risky activities. She gave birth to Child in April 2017. Thereafter, due to Mother's drug addiction and related issues, the maternal aunt (Mother's sister; Aunt) provided significant periods of care for Child.

In August 2018, Mother left Child with Aunt. Weeks and then months passed, during which time Mother was mostly out of contact, having relapsed on drugs. Aunt informed Mother that Aunt could no longer care for Child, but Mother refused to pick Child up. Child missed two medical check-ups because Mother would not consent to Aunt's taking Child to doctor's appointments. Aunt was further concerned that Child would be neglected by Mother or harmed by domestic violence between Mother and the

¹ *People v. Marsden* (1970) 2 Cal.3d 118.

alleged father.² Aunt decided she could no longer care for Child under these and other precarious circumstances.

In October 2018, the San Diego County Health and Human Services Agency (Agency) received a referral that there was no parent or guardian willing or able to care for one-year-old Child. After investigating the referral and being unable to find or contact Mother, the Agency filed a petition on Child's behalf seeking juvenile court protection. (Welf. & Inst. Code, § 300, subd. (b).)³ The petition alleged that Child was without a caregiver and Mother had a history of methamphetamine abuse.

At the detention hearing, Mother appeared and was represented by appointed counsel. Through her counsel, Mother denied the petition's allegations and argued that out-of-home detention was unnecessary because Mother was able to care for Child. Mother's appointed counsel also requested specific services for her client, such as individual therapy and housing/transportation assistance. After considering the evidence and arguments made, the court ordered out-of-home detention, but acknowledged Mother's request for specific services.

Subsequently, Mother was agitated and defensive when interacting with social workers, resentful of Aunt, and denied any child neglect. The Agency's continuing investigation showed that Mother had tested positive for methamphetamine multiple times while pregnant. Although Mother completed the KIVA drug treatment program

² The alleged father was not elevated to presumed father nor is he a party to this appeal. Our discussion of facts relating to him is accordingly limited.

³ Further unspecified statutory references are to the Welfare and Institutions Code.

after her baby's birth, she relapsed in the August or September 2018 timeframe. Mother admitted she was "always going to be [an] addict," experienced constant cravings for methamphetamine, and her only plan to safely care for Child was to leave her daughter with Aunt, who, as we have noted, was unable or unwilling to continue providing care. Mother had no employment or fixed residence; she was "couch surfing" at friends' and family members' houses.

On November 7, 2018, at the jurisdiction and disposition hearing, Mother, through her counsel, set the matter for trial on the truth of the petition's allegations and, in the event of a true finding on the petition, requested the child's placement in Mother's care on a family maintenance plan. The court set a settlement conference and trial date, advising Mother that "if you are not here on [specified dates], we do have to go forward without you."

Despite being provided with all the information necessary to complete voluntary services, Mother made little effort to do so. She attended one therapy session, one parenting class, and made minimal progress on a 12-step sobriety program. She had sporadic visits with Child, which were generally appropriate.

Mother and her counsel appeared at the scheduled settlement conference and confirmed a two-hour trial estimate. Mother's counsel filed a notice of objection to hearsay statements contained in the Agency's reports, requiring Aunt and both the Agency's assigned social workers to be present at trial for cross-examination.

The contested jurisdiction and disposition hearing took place on March 8, 2019, almost five months after Child was originally detained out of home.⁴ Mother was not present when trial began at about 9:15 a.m. Her counsel requested a continuance, indicating she had spoken to Mother on the phone the day before, Mother confirmed she would be at court at 8:00 a.m., and Mother wished to testify. Counsel also stated that her client had "expressed a lot of dissatisfaction with her counsel, so one of the first things [counsel] intended to do with her this morning was to advise her [of] her rights to a Marsden hearing and deal with that issue before commencing with this trial." The Agency and minor's counsel objected to a continuance. The court denied counsel's request for a continuance, noting Mother's history of arriving late to appointments and resisting the Agency's intervention.

The court proceeded to receive the Agency's detention report, jurisdiction and disposition report, and addendum reports in evidence without objection, and heard the testimony of one of the Agency's social workers, who was subject to cross-examination by Mother's counsel. Beginning at about 10:05 a.m., Aunt testified to her relationship with Mother and the events that led to the Agency's involvement in Child's case. Aunt was concerned about Mother's ability to care for and protect her daughter while she was using drugs.

At about 10:25 a.m., over an hour after the two-hour estimated trial had passed, Mother arrived in the courtroom and sat next to her counsel. Aunt's testimony was still

⁴ The court had to reschedule the initially set contested hearing date due to witness unavailability and counsel's illness.

underway. At 10:33 a.m., Mother disrupted the proceeding and requested a few minutes to speak to her counsel privately. The court granted a brief recess. At 10:41 a.m., the court reconvened. At that time, Mother's counsel stated on the record that Mother was requesting new appointed counsel and a *Marsden* hearing, as follows:

"MOTHER'S COUNSEL: Your honor, I need to make the record of the fact that when I spoke with my client, she was adamant that she wants an opportunity for this court to hear her regarding her request for new counsel.

"She indicates that it is her belief that she expressed to me last night that she wanted me fired. And so she's asking for this [c]ourt to hear her in a Marsden hearing.

"THE COURT: All right. Thank you, [counsel], for your advocacy on [Mother's] behalf. I'm denying the request for a Marsden. A Marsden, of course, does have to be—a motion for a Marsden hearing has to be made timely by a litigant. We are at this point over an hour into trial.

"MOTHER: But I told her yesterday.

"THE COURT: I will also observe that based just on my observations this morning, [counsel] has been doing an extremely thorough, well prepared job of cross-examining the witnesses, so the motion is denied.

"MOTHER: But you didn't even hear my evidence to give of why.

"THE COURT: Ma'am.

"MOTHER: I mean, I'm allowed by law to request time in your chambers alone to tell you why I would not want my attorney to represent me. I am, by law, I am.

"THE COURT: Your motion is denied.

"MOTHER: But you are supposed to let me, allowed by law, alone in your chambers to let you—to try to convince you why my attorney can't represent me.

"THE COURT: I've made my ruling, [Mother].

"MOTHER: All right, thank you. I don't need to deal with this."

Mother made some angry remarks to Aunt and left the courtroom. The court recessed once more, and Mother returned to the courtroom. After trial recommenced, Mother's counsel was able to cross-examine Aunt, and the Agency presented its final witness (another social worker), who was likewise cross-examined.

Mother conferred with her counsel at crucial moments of the trial. For example, after the Agency rested its case, Mother and counsel privately conferred regarding "whether or not [Mother's] going to testify." After their conference, Mother testified. She disputed the accuracy of Aunt's statements, but admitted she had an "anger problem," experienced a drug relapse in late summer 2018, and was presently unprepared to care for Child.

After the evidentiary portion of trial concluded, counsel made closing arguments. Mother's counsel articulated a well-reasoned argument on Mother's behalf, asking for the petition to be dismissed, or if not, Child's placement with Mother. The theme of counsel's closing argument was that Mother had left Child safely with Aunt for a finite period, Mother was six months clean from methamphetamine use, and was undisputedly an appropriate caregiver when sober. Mother left the courtroom at some point during the Agency's closing argument, but at the behest of her counsel, returned to hear the court's ruling.

After considering the evidence and arguments, the court made a true finding on the petition's allegations by clear and convincing evidence. The court based its decision in large part on Aunt's testimony, which it found to be "very credible." Further, based on essentially uncontroverted evidence that Mother was an "untreated addict," the court found Child would be in substantial danger if returned home. The court ordered reunification services for Mother. This appeal followed.

DISCUSSION

Mother argues the court erred in failing to conduct a *Marsden* hearing prior to denying her request for new counsel, that is, the court did not afford her the opportunity to explain why she believed her counsel was ineffective.

" 'Because a basic civil right of the parent is . . . at stake [citation], significant due process safeguards have been built into the dependency scheme [citation], including a right to court-appointed counsel for a parent who cannot afford to retain counsel (Welf. & Inst. Code, § 317).' [Citation.] 'All parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel.' (§ 317.5, subd. (a); see Cal. Rules of Court, rule 5.660(d).)" (*In re M.P.* (2013) 217 Cal.App.4th 441, 454 (*M.P.*).)

"Juvenile courts, relying on the *Marsden* model, have permitted the parents . . . to air their complaints about appointed counsel and request new counsel be appointed." (*In re V.V.* (2010) 188 Cal.App.4th 392, 398; see *In re Z.N.* (2009) 181 Cal.App.4th 282, 289 (*Z.N.*) [applying *Marsden* principles to dependency proceeding].)

In *Marsden*, the California Supreme Court stated: "A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is

cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom Thus, a judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney. A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention 'is lacking in all the attributes of a judicial determination.' " (*Marsden, supra*, 2 Cal.3d at pp. 123, 124.) Our high court concluded: "Because the defendant might have catalogued acts and events beyond the observations of the trial judge to establish the incompetence of his counsel, the trial judge's denial of the motion without giving defendant an opportunity to do so denied him a fair trial. We cannot conclude beyond a reasonable doubt that this denial of the effective assistance of counsel did not contribute to the defendant's conviction. (*Chapman v. California* (1967) 386 U.S. 18.)" (*Marsden*, at p. 126.)

The availability of a *Marsden* hearing protects a defendant's constitutional right to effective assistance of counsel. (*Marsden, supra*, 2 Cal.3d at p. 123.) In criminal cases, "[w]hen a defendant seeks new counsel on the basis that his appointed counsel is providing inadequate representation . . . the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance." (*People v. Smith* (2003) 30 Cal.4th 581, 604 (*Smith*).) "[A]t any time during criminal proceedings, if a defendant requests substitute counsel, the trial court is

obligated, pursuant to . . . *Marsden*, to give the defendant an opportunity to state any grounds for dissatisfaction with the current appointed attorney." (*People v. Sanchez* (2011) 53 Cal.4th 80, 90.) A *Marsden* "inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the *future*." (*People v. Smith* (1993) 6 Cal.4th 684, 695.)

" 'A defendant is entitled to relief [(i.e., new counsel)] if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. Substitution of counsel lies within the court's discretion. The court does not abuse its discretion in denying the motion unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel.' " (*Z.N., supra*, 181 Cal.App.4th at pp. 293-294 [quoting *Smith, supra*, 30 Cal.4th at p. 604].)

In *Z.N.*, at the start of a continued section 366.26 hearing, the mother made a *Marsden* motion, while her counsel made a motion to be relieved as counsel. (*Z.N., supra*, 181 Cal.App.4th at p. 288.) "The court cleared the courtroom and heard each movant relate, in essence, that their relationship had deteriorated to the point that they could no longer communicate effectively." (*Ibid.*) The court denied both motions. (*Id.*) On review, the court of appeal considered "(1) the timeliness of the [*Marsden*] motion, (2) the adequacy of the court's inquiry into the defendant's complaint, and (3) whether the conflict was so great that it resulted in a total lack of communication preventing an adequate defense." (*Id.* at p. 294.)

In this case, Mother made her *Marsden* motion after the contested hearing was substantially underway. The juvenile court denied the motion as untimely and made no inquiry into the reasons why Mother was requesting new counsel. We are troubled by the court's failure to inquire into the reasons behind Mother's request.

We may reasonably infer from the record that Mother's conflict with her counsel related to some aspect of trial or trial preparation since there was no voiced conflict before then, but we have no specific information regarding Mother's grievances. Any analysis regarding the merits (or lack thereof) of her request for new counsel is necessarily curtailed. Although we are firmly convinced that counsel was effectively representing Mother in Child's dependency case, in many cases it will be essential to know the reasons for the parent's dissatisfaction with his or her current counsel in order to reach a rational decision whether to appoint new counsel. (*Marsden, supra*, 2 Cal.3d at p. 123.)

The Agency argues that Mother's motion was correctly denied as untimely. *Marsden* motions have been properly denied as untimely when made in a "nearly completed proceeding" (e.g., *People v. Whitt* (1990) 51 Cal.3d 620, 659 (*Whitt*) [motion made at posttrial hearing]) or when replacing counsel would have entailed a significant delay (e.g., *Smith, supra*, 30 Cal.4th at p. 607 [new counsel for capital penalty phase would have caused a mistrial]). However, such untimely motions were accompanied by a record of the court's awareness of, or inquiry into, the defendant's reasons for wanting new counsel, which also illuminated why the motion was untimely. (E.g., *Whitt*, at p. 658; *Smith*, at p. 607; *Z.N., supra*, 181 Cal.App.4th at pp. 289-293.)

Here, Mother was undeniably late to trial through no fault of the court or counsel, and she could have made her motion earlier. However, the trial was not "nearly completed" when she made her motion since Mother had yet to present her defensive case. Moreover, because Mother was not allowed to make a record of her reasons for requesting new counsel, we are hard pressed to say what sort of delay would have ensued. We fully appreciate the differences between criminal and dependency proceedings, but the juvenile court's *Marsden*-type inquiry presumably could have been made at an appropriate time in a matter of minutes.

Nonetheless, Mother must establish that the court's failure to make a *Marsden*-type inquiry was prejudicial. (*Z.N.*, *supra*, 181 Cal.App.4th at p. 296; *People v. Washington* (1994) 27 Cal.App.4th 940, 944.) Mother has not provided, nor are we independently aware of, any authority establishing that an error like the one here amounts to a constitutional due process violation. Mother's brief essentially acknowledges she must make a showing of prejudice under state law, i.e., she must show that it is "reasonably probable that a result more favorable" would have resulted had the *Marsden* inquiry occurred. (*M.P.*, *supra*, 217 Cal.App.4th at p. 460; see also *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1668 ["violation of a statutory right to counsel is properly reviewed under the harmless error test enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836"].)

On the record before us, we are persuaded that the court's failure to make a *Marsden*-type inquiry was not prejudicial. Mother's appeal does not identify any incompetent acts by counsel, and in reviewing the entire record, we find no evidence of

ineffectiveness.⁵ For example, observing that the Agency's case relied in large part on Aunt's credibility, counsel took steps to require Aunt's presence at trial and then conducted a vigorous cross-examination. We agree with the juvenile court's appraisal of counsel's performance—she did an "extremely thorough, well prepared job of cross-examining the witnesses."

In addition, the trial *was* substantially underway by the time of Mother's *Marsden* motion. By that time, the court had already received much of the Agency's evidence supporting its case-in-chief. We cannot conceive of what new appointed counsel could have done from that point forward to yield a better trial outcome.⁶

The record also contains no indication of a breakdown in communication between client and counsel; to the contrary, the record discloses that Mother was communicating with her counsel before and throughout trial and that counsel was aware of, and respecting, Mother's wishes. Mother wished to testify at trial, and she did so with her counsel's conducting the direct examination. (C.f., *Z.N.*, *supra*, 181 Cal.App.4th at p. 289

⁵ "To prove a claim of ineffective assistance of counsel, [a parent has] to show counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. [Citations.] She also ha[s] to show prejudice, meaning a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 261.)

⁶ It was incumbent on Mother to be present in court at the start of trial if she wished to be heard on her *Marsden* motion before trial commenced. The juvenile court was not obligated to indefinitely stall or delay the scheduled proceeding to see if Mother might appear, particularly since she was on notice that the contested hearing was scheduled to begin at 8:00 a.m.

[client and counsel agreed that their communication had "severely broken down" and that they could not speak to each other anymore].)

In sum, we see no indication Mother was denied effective assistance of counsel. The record amply supports the court's assuming dependency jurisdiction and removing Child from Mother's care. Even if the court had made a *Marsden*-type inquiry, and new counsel had been appointed, we do not find it reasonably probable that a result more favorable would have resulted. Thus, any error by the trial court was harmless.⁷

⁷ Even if evaluated under the standard of review for federal constitutional violations (*Chapman v. California* (1967) 386 U.S. 18), we would find the error harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

IRION, J.

GUERRERO, J.